

<sup>3</sup> The U.S. Department of Justice, Charles S. Samuels, the Federal Bureau of Prisons, Jerry C. Martinez, Helen Marberry, PQR Insurance Company, STU Insurance Company, John Doe, Jane Doe, United States of America, U.S. Attorney General, and Conjugal Partnerships Doe-Lynch, Samuels-Doe, Doe Marberry, Martinez-Doe.

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1 Puerto Rico. (Docket No. 52 at 4-5). While they were employed, in February 2013, a fellow guard was  
2 murdered. Id. at 5. A day later, the FBI interviewed Plaintiffs and transported them and their families  
3 to a safe house somewhere in Puerto Rico, and later, to the United States. Id. at 5-6. Once in the United  
4 States, Plaintiffs moved with their families to locations where friends or relatives lived. Id. at 6.  
5 Eventually, the Bureau of Prisons reassigned Plaintiffs to facilities at those locations. Id. According to  
6 Plaintiffs, they were assigned to work with inmates at those locations and placed in direct and imminent  
7 danger. Id. The ensuing facts provided in the complaint are presented confusingly and, fortunately, are  
8 not dispositive at this stage. The main takeaway, however, is that Plaintiffs filed administrative tort  
9 complaints between 2014-15. Id. at 10-12. Eventually, in March 2016, Plaintiffs filed the first of four  
10 complaints in this case.

11 If one were to print the four versions of Plaintiffs' complaint, the corresponding motions to  
12 dismiss, responses, and requests for leave to amend the complaint, the stack of papers would, as  
13 Winston Churchill once said, "by its very length defend[] itself against the risk of being read."<sup>4</sup>  
14 Originally, Plaintiffs filed a complaint asserting claims under the Federal Tort Claims Act (FTCA) and  
15 Bivens, 403 U.S. at 388. (Docket No. 1). Months later, they filed the first of three amended complaints.  
16 (Docket No. 22). When Defendants replied by filing their first motion to dismiss, Plaintiffs amended  
17 their complaint again, replacing the FTCA claims with claims under the Civil Service Reform Act  
18 (CSRA). (Docket Nos. 23; 28; 29). In due time, Defendants moved to dismiss the CSRA claims  
19 because Plaintiffs failed to exhaust administrative remedies; the Court agreed and dismissed the CSRA  
20 count. (Docket Nos. 38; 42) When Defendants moved to dismiss the surviving Bivens claim in a  
21 separate motion, Plaintiffs asked to amend their complaint again. (Docket Nos. 43; 47). The Court  
22 acquiesced. In the third amended complaint, Plaintiffs substituted their claims under the CSRA for  
23 claims under the Administrative Procedure Act (APA). (Docket Nos. 51; 52).

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1 Thus, the third amended complaint asserts claims under the APA and Bivens. Plaintiffs allege  
2 that the APA allows them to seek judicial review for the decision to transfer them from the MDC to  
3 other prisons without adequate notice. (Docket No. 52 at 15). In their second count, Plaintiffs allege  
4 that Bivens entitles them to recover damages for Defendants' negligence for failing to consider the  
5 threats they received, as well as the health problems that arose as a result. Id. For the third time,  
6 Defendants move to dismiss for lack of subject matter jurisdiction and failure to state a claim. (Docket  
7 Nos. 53; 73).

## 8 II. Standard of Review

9 As courts of limited jurisdiction, federal courts must construe their jurisdictional grants  
10 narrowly. Destek Grp. v. State of N.H. Pub. Utils. Comm'n, 318 F.3d 32, 38 (1st Cir. 2003).  
11 Consequently, the party asserting jurisdiction carries the burden of showing the existence of federal  
12 jurisdiction. Viqueira v. First Bank, 140 F.3d 12, 16 (1st Cir. 1998). When deciding whether to dismiss  
13 a complaint for lack of subject matter jurisdiction, the Court "may consider whatever evidence has  
14 been submitted, such as . . . depositions and exhibits." Aversa v. United States, 99 F.3d 1200, 1210  
15 (1st Cir. 1996); Torres v. Bella Vista Hosp., Inc., 523 F. Supp. 2d 123, 132 (D.P.R. 2007). Motions  
16 brought under Rule 12(b)(1) are subject to the same standard of review as Rule 12(b)(6). Negrón-  
Gaztambide v. Hernández-Torres, 35 F.3d 25, 27 (1st Cir. 1994); Torres, 523 F. Supp. 2d at 132.

17 When considering a motion to dismiss for failure to state a claim upon which relief can be  
18 granted under Rule 12(b)(6), the Court analyzes the complaint in a two-step process under the current  
19 context-based "plausibility" standard established by the Supreme Court. See FED. R. CIV. P. 12(b)(6),  
20 Schatz v. Republican State Leadership Comm., 669 F.3d 50, 55 (1st Cir. 2012) (citing Ocasio-  
21 Hernández v. Fortuño-Burset, 640 F.3d 1, 12 (1st Cir. 2011), which discusses Ashcroft v. Iqbal, 556  
22 U.S. 662 (2009) and Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007)). First, the Court must "isolate  
23 and ignore statements in the complaint that simply offer legal labels and conclusions or merely rehash  
24 cause-of-action elements." Id. A complaint does not need detailed factual allegations, but "[t]hreadbare

1 recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.”  
2 Iqbal, 556 U.S. at 678-79. Second, the Court must then “take the complaint’s well-[pleaded] (i.e., non-  
3 conclusory, non-speculative) facts as true, drawing all reasonable inferences in the pleader’s favor, and  
4 see if they plausibly narrate a claim for relief.” Schatz, 669 F.3d at 55. Plausible means something  
5 more than merely possible, and gauging a pleaded situation’s plausibility is a context-specific job that  
6 compels the Court to draw on its judicial experience and common sense. Id. (citing Iqbal, 556 U.S. at  
7 678-79). This “simply calls for enough facts to raise a reasonable expectation that discovery will reveal  
8 evidence of” the necessary element. Twombly, 550 U.S. at 556.

9 “[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility  
10 of misconduct, the complaint has alleged—but it has not ‘show[n]’—that the pleader is entitled to  
11 relief.” Iqbal, 556 U.S. at 679 (quoting FED. R. CIV. P. 8(a)(2)). If, however, the “factual content, so  
12 taken, ‘allows the court to draw the reasonable inference that the defendant is liable for the misconduct  
13 alleged,’ the claim has facial plausibility.” Ocasio-Hernández, 640 F.3d at 12 (quoting Iqbal, 556 U.S.  
14 at 678).

### 15 III. Discussion

16 Defendants advance three arguments: (1) the CSRA precludes the APA and Bivens, (2) Bivens  
17 claims are time-barred, and (3) federal employees are entitled to qualified immunity. (Docket No. 53).  
18 In their response, Plaintiffs only address the second and third arguments. (Docket No. 56). Since the  
19 Court can grant Defendants’ motion based on their first argument alone under Rule 12(b)(6), it will  
20 not consider the remaining two.

#### 21 A. Whether the CSRA Precludes the APA

22 The APA allows judicial review for “final agency action for which there is *no other adequate*  
23 *remedy* in a court.” 5 U.S.C. § 704 (emphasis added). As Defendants point out, “not only does the  
24 CSRA provide a remedy . . . it provides the sole remedy.” (Docket No. 53 at 7). The First Circuit “has  
termed the CSRA framework ‘the exclusive mechanism for challenging adverse personnel actions in

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1 federal employment.” Gonzalez v. Velez, 864 F.3d 45, 55 (1st Cir. 2017) (quoting Rodriguez v. United  
2 States, 852 F.3d 67, 82 (1st Cir. 2017)). Indeed, the First Circuit has held that “[a] federal employee  
3 generally may not pursue alternative routes of judicial review, such as by filing a civil action in district  
4 court under the APA.” Rodriguez, 852 F.3d at 82. Accordingly, lower courts in the First Circuit have  
5 held that the CSRA precludes an APA claim in the context of federal employment. See, e.g., Villanueva  
6 v. United States, 740 F. Supp. 2d 322, 325 (D.P.R. 2010) (APA inapplicable because remedy lies in  
7 CSRA); Taydus v. Cisneros, 902 F. Supp. 288, 294 (D. Mass. 1995). Other circuits have ruled  
8 similarly. See Taydus 902 F. Supp. at 292-93 (listing cases from the 4th, 5th, 6th, 9th, 11th, and D.C.  
9 Circuits).

10 Here, the CSRA precludes Plaintiffs’ APA claims. Plaintiffs are federal employees and contest  
11 a transfer, which is a personnel action under the CSRA. See U.S.C. § 2302 (a)(2)(A)(iv). Plaintiffs also  
12 concede that the CSRA governs their claims. (Docket No. 26 at 1 (“Defendant alleges that Plaintiffs’  
13 claims under the Federal Torts Claims Act are preempted by the Civil Service Reform Act. We agreed  
14 [sic.]”). Because the CSRA applies here and the CSRA is “the *exclusive* mechanism for challenging  
15 adverse personnel actions in federal employment,” the CSRA precludes the APA in this case.  
16 Gonzalez, 864 F.3d at 55. Plaintiffs are not entitled to circumvent their failure to prosecute their case  
17 under the CSRA by bringing a claim under the APA. Worsening matters, Plaintiffs do not argue why  
18 the CSRA does not preclude the APA. “It is not enough merely to mention a possible argument in the  
19 most skeletal way, leaving the court to do counsel’s work, create the ossature for the argument, and  
20 put flesh on its bones. . . . ‘Judges are not expected to be mindreaders. Consequently, a litigant has an  
21 obligation to spell out its arguments squarely and distinctly, or else forever hold its peace.’” United  
22 States v. Zannino, 895 F.2d 1, 17 (1st Cir. 1990) (citing Rivera-Gomez v. De Castro, 843 F.2d 631,  
23 635 (1st Cir. 1988) (internal quotations omitted)). Taking all the facts in the complaint as true, the  
24 Court finds that Plaintiffs have not pled a plausible claim for relief. The APA count is therefore  
**DISMISSED.**

1 B. Whether the CSRA Precludes Bivens

2 Plaintiffs' second count seeks relief under Bivens. In Bivens, the Supreme Court established  
3 "that a Fourth Amendment violation by federal agents, acting under color of governmental authority,  
4 gave rise to a cause of action for money damages against those agents in their individual capacities."  
5 Gonzalez, 864 at 52 (citing Bivens, 403 U.S. at 389). Essentially, the Supreme Court created "a new  
6 constitutional tort." Id. The boundaries of this type of tort "are hazy" and the Supreme Court has "made  
7 plain its reluctance to extend the Bivens doctrine to new settings." Id. The test to determine if Bivens  
8 applies should consider three questions: (1) would it be extended to a new context, (2) are there  
9 alternative means of obtaining relief, and if so, (3) do special factors "counsel hesitation in extending  
10 the reach of the Bivens doctrine." Id. (citing Ziglar v. Abbasi, 137 S. Ct. 1857, 1865 (2017)).

11 Recent First Circuit case law supports finding that Plaintiffs lack a plausible claim under  
12 Bivens because the CSRA provides an alternative means of obtaining relief. In Gonzalez, the First  
13 Circuit rejected an attempt to sue coworkers and supervisors—federal employees—in their individual  
14 capacities under Bivens. Id. Addressing plaintiffs' discrimination claims, the First Circuit explained  
15 that "the CSRA and Title VII, with their regulatory accoutrements, form a comprehensive remedial  
16 network fully capable of protecting federal employees against acts of discrimination in the workplace."  
17 Id. at 54. Thus, when the CSRA provides an adequate remedy "[t]here is no justification for implying  
18 a Bivens-type remedy." Id. Here, Plaintiffs concede that the CSRA applies. To their misfortune, they  
19 failed to adequately prosecute the CSRA claims. But this "accident" does not entitle them to relief  
20 under Bivens because it does not defeat the fact that an adequate remedy existed under the CSRA, a  
21 dispositive factor. See id. at 53 (even assuming the case does not apply Bivens to a new context,  
22 "plaintiffs hit a roadblock at the next step of the analysis, that is, whether there exists an alternative  
23 process that Congress reasonably may have viewed as an equally effective surrogate for an action  
24 brought directly under the Constitution," in this case the CSRA). Therefore, Plaintiffs' second claim  
is also **DISMISSED**.

C. Articles 1802 and 1803

Plaintiffs' claims under Articles 1802 and 1803 of the Puerto Rico Civil Code are dismissed as well. "[A] plaintiff may only pursue an Article 1802 claim when it is based on 'tortious or negligent conduct distinct from that covered by the specific laws invoked, or which have an independent basis to support them.'" Irizarry v. Kmart Corp., No. CV 15-2330, 2016 WL 270386, at \*2 (D.P.R. Jan. 21, 2016). An 1803 claim asserts the same conduct but holds superiors accountable under the doctrine of *respondeat superior*. Here Plaintiffs base their Article 1802 and 1803 claims on tortious conduct that they allege is covered by the APA and Bivens. Therefore it is not "conduct distinct from that covered by the specific laws invoked." Nor do Plaintiffs have "an independent basis to support [their 1802 and 1803]" because the CSRA establishes the *exclusive* remedy for the type of conduct that Plaintiffs are suing for. See also Torres-Medina v. Dep't of the Army, No. 15-2085, 2016 WL 4179885, at \*3 (D.P.R. Aug. 4, 2016) ("Plaintiff's Article 1802 and 1803 claims also fail. The Rehabilitation Act is not only 'the judicial avenue appropriate for a federal employee's disability discrimination allegation, . . . [but also] the exclusive remedy for [Plaintiff]'s disability discrimination claim'" (internal citations omitted); De Jesus-Maldonado v. Veterans Admin. Hosp., No. 09-1574, 2009 WL 2778055, at \*2 (D.P.R. Aug. 25, 2009) ("Because of the *exclusive* nature of the remedy, an FTCA action may not be brought in conjunction with a state law tort claim, such as Article 1802.") (emphasis added) Therefore, if Plaintiffs' APA and Bivens counts fail because the CSRA provides the exclusive remedy, so must their 1802 and 1803 counts.

Even if the CSRA did not preclude the Articles 1802 and 1803 counts, the Court notes that it may dismiss the claims against the United States and federal employees in their official capacity. It is well established that, as a sovereign, the United States is immune from suit unless it waives its immunity and consents to be sued. See United States v. Mitchell, 463 U.S. 206, 212 (1983) ("It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction."). The United States has not expressly waived its immunity here, nor

1 has it expressly consented to be sued under the state laws of Puerto Rico; thus, jurisdiction does not  
2 exist. Accordingly, counts three and four are **DISMISSED**.

3 **IV. Conclusion**

4 Defendants' motion to dismiss at Docket No. 53 is **GRANTED**. Plaintiffs' claims are  
5 dismissed with prejudice and the Court will enter judgment accordingly.

6 **SO ORDERED.**

7 In San Juan, Puerto Rico this 22nd day of January, 2018.

8 *s/ Gustavo A. Gelpí*  
9 GUSTAVO A. GELPI  
United States District Judge